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In the

Supreme Court of the United States

October Term, 1960

No. 326

LEWIS LLOYD ANDERSON,

Petitioner,

vs.

STATE OF ALABAMA

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA BRIEF AND ARGUMENT OF RESPONDENT

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BRIEF AND ARGUMENT ON THE MERITS BRIEF AND ARGUMENT OF RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is reported as follows:

Lewis Lloyd Anderson v. State of Alabama, 40 Ala. App. 509, 120 So. 2d 397. The opinion of the Supreme Court of Alabama, denying certiorari and denying the application for rehearing, is reported at 270 Ala. 575, 120 So. 2d 414. The decision of this Honorable Court granting certiorari is reported at 5 L. Ed. 2d 100.

II

JURISDICTION

The petitioner has been granted a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama rendered November

10, 1959, rehearing denied on December 1, 1959, under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

The petition in this case presents the following questions:

1. Whether the petitioner, who stands convicted in the State of Alabama of first degree manslaughter, as defined by Title 14, Section 320, Code of Alabama 1940, was indicted by a grand jury and convicted by a petit jury from which Negroes were systematically excluded by the Jury Commission of Dallas County, Alabama, contrary to the provisions of the Fourteenth Amendment. The State of Alabama contends that Negroes were not systematically excluded from jury service on said juries.

2. Whether the equal protection clause of the Fourteenth Amendment to the Constitution of the United States entitled petitioner to any percentage of racial representation in the grand jury which indicted him or in the petit jury which convicted him.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Dallas County, Alabama, of first degree manslaughter and sentenced to ten years' imprisonment. Before entering upon the trial in said Circuit Court, the petitioner filed

motion to quash the indictment. He also filed a motion to quash the venire, followed by a motion to declare void the composition of the jury sworn to try the defendant, all motions alleging systematic exclusion of Negroes from jury service. The petitioner then brought out testimony of the circuit solicitor that since August, 1954, no Negroes had served on grand juries, but that each and every venire from which grand and petit juries were selected contained a number of Negroes, the largest number being seven or eight; that the number of Negroes in the venire drawn for the trial of this case contained five Negroes, three of whom were excused (two of these for illness and one over age) and that two Negroes were left on the present venire. The Circuit Clerk testified that Negroes were drawn every session of Court as jurors, but that there was no identification as to race on the card drawn from the jury box. The present Clerk of the Jury Commission testified that her job was clerical work and she had no way of knowing whether the names on the jury roll were white or colored, and that she had no knowledge of the race of those who served on grand juries. The Deputy County Solicitor could recall only one Negro serving on the grand jury around 1954. Petitioner then called five Negroes who had never served on the grand jury and could recall no Negro having thus served. Cross-examination brought out that their knowledge of courts was rather sketchy. Petitioner called Glenn Defke, Chairman of the Jury Commission since April, 1954, who stated he went to different parts of the country and asked about different prospective jurors and interviewed both Negroes and whites the same way; that in precincts where he didn't know the Negroes he would ask some good white man; that, when selected as veniremen, the name of each venireman is placed on a card and put into the box with no identification as to race. Defke was reared in Colorado and testified that the only precinct that he could positively testify as to number of people on the jury roll was Martin's Station, Alabama, where he has resided since 1919; that of the seven people on the jury roll from his precinct four were Negroes and three were whites. He further testified that the total number of jurors on the register was eighteen hundred and that one in ten was Negro, but that both of these figures were guesses on his part.

Terrell Hicks testified that he served on a grand jury in 1954 with a Negro named Dawson (R. pp. 45,46).

The Sheriff of Dallas County, Alabama, testified that since November 8, 1955, when he became Sheriff, it was his duty to serve subpoenas on people to come and serve on juries and that he had never served such subpoenas when there were no Negroes called to jury duty; that the number of Negro jurors varied from two to six and that the average number of jurors summoned is sixty to seventy or sixty to ninety-five. (R. pp. 47-50.)

There was testimony given that about seventy-five percent to eighty-five percent of the arrests in the city and county were Negroes, including repeaters.

The books containing the jury rolls were never requested nor produced in Court to show exclusion of Negroes.

No testimony was introduced to show fraudulent drawing from the jury box for the venire or from the bat (or box) in picking a grand jury panel or a deliberate wilful passing over all qualified Negroes in making up the original list. Nor was any testimony introduced to show how the State and petitioner chose to exercise the striking of the jury.

After hearing the testimony and considering the evidence offered by both petitioner and the State, the trial court overruled the motions.

At the conclusion of preliminary motions, petitioner entered a plea of not guilty. Trial was had before a jury which found petitioner guilty of manslaughter in the first degree and fixed his punishment at imprisonment in the Penitentiary of Alabama for ten years. The Court thereupon adjudged petitioner guilty of manslaughter in the first degree and sentenced him to ten years' imprisonment. Petitioner gave notice of appeal in open court and service of sentence was suspended pending appeal. Motion for new trial was overruled. The judgment and sentence of the lower court was affirmed by the Court of Appeals of Alabama, rehearing

therein denied, petition to the Supreme Court of Alabama for writ of certiorari was denied and application to that court was subsequently denied, hence this petition for writ of certiorari.

The evidence was that on January 20, 1959, prosecution witnesses saw petitioner driving a car along Minter Street in Selma, Alabama, headed east at a speed of between sixty and seventy miles per hour; that Minter is an unpaved street in bad condition because of damp weather; that petitioner got to the corner of Church Street, ran into the front bumper of a green Chevrolet headed north on Church; that the momentum carried petitioner's car down Minter Street, where it swung to the right, then caromed to the left off some stone blocks on the north edge of the carriageway. As it began to swing again to the right, it hit and fatally injured Tom Reese, a Negro. After swerving to the right side of the street, it went back into the road again, on to the end of the block, where it hit a tree, bounced four feet in the air and turned over.

The defense was that the collision with the green Chevrolet was accidental, that petitioner was not speeding and that petitioner was knocked unconscious at the time of first impact. The conflict in evidence presented a jury question and the jury's verdict was that petitioner was guilty of manslaughter in the first degree.

VI

SUMMARY OF ARGUMENT

The lack of proportional representation of Negroes on the jury does not constitute discrimination under the facts presented. The evidence does not show that Negroes were arbitrarily or systematically excluded, in violation of the Fourteenth Amendment, from service either on the grand jury which indicted the petitioner or the petit jury which convicted him. Evidence presented by the State nullified any alleged inference or presumption of discrimination.

VII

ARGUMENT

The petitioner filed a motion to quash the indictment (R. p. 2), motion to quash venire (R. p. 5) and motion to declare void the composition of the jury sworn to try defendant (R. p. 7). Alleged systematic exclusion of Negroes from the jury rolls resulting in denial of due process and equal protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in his trial and conviction of manslaughter in the first degree was the basis of these motions. The testimony is set out at length in the record, and is summarized for the convenience of this Court in our statement.

The question as to the sufficiency or weight of the evidence offered in support of claimed racial discrimination or exclusion jury selection is one of fact requiring consideration of the particular proof where several circumstances are to be weighed together in reaching a determination.

To prove racial discrimination, petitioner, after filing his motions, introduced the 1950 Federal census, which disclosed 6,940 male whites over twenty-one years of age and 7,956 male Negroes over twenty-one years of age in Dallas County, Alabama, and followed this by testimony as summarized in our statement and testimony of petitioner that he was a Negro and resident of Dallas County, Alabama.

Mere allegations of discrimination are not sufficient in and of themselves to sustain such a contention and the burden of proof to show an alleged discrimination is on the one making the allegation. *Smith v. Mississippi*, 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900. The pattern of such proof is stated in *Hernandez v. Texas*, 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667:

> "Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof es-

tablished by Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion" has been applied in other cases, and it is available in supply proof of discrimination against any delineated class."

In motions such as filed before the trial court, the movant carries the burden of proof to offer enough substantial evidence to reasonably satisfy the trial judge of the existence of a scheme to exclude. Respondent submits that the trial court's action in overruling the motions was rightly affirmed by the Court of Appeals of Alabama. As was stated in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1286:

"While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect (citing cases) we accord in that examination great respect to the conclusion of the state judiciary. Pierre v. La. 306 U. S. 354, 358, 83 L. Ed. 757, 760, 59 S. Ct. 536."

Respondent submits that the burden of proof was not met by petitioner. While he did show that he was a member of an existing racial class and that some Negroes were qualified for jury service but he failed miserably in the proof that none had been called. The testimony of the Circuit Solicitor, Circuit Clerk and Sheriff discloses that every venire summoned contained an average of seven or eight Negroes, with the normal venire being around seventy persons. Testimony of the Circuit Solicitor further brought out that five Negroes were summoned on the venire from which was selected the

petit jury which tried petitioner; that of these five, two were excused for serious illness and one for being over sixty-five and that two remained on the list.

In noncapital criminal cases, it is within the province of the trial judge to excuse jurors from service on petit juries and the same rule applies in the selection of grand juries. Title 30, Section 38, Code of Alabama 1940, and the fact that in the last five years some Negroes have asked to be excused from jury service is not a showing of any action of respondent or any of its officials to exclude them from juries Whites have likewise been excused.

The testimony of Glenn Defke, Chairman of the Jury Commission, showed that it was the policy of the Jury Commission to interview prospective jurors of both races without discrimination and that no card in the jury box was identifiable as to race. An illustration of such nondiscrimination was that Mr. Defke's precinct had four Negroes and three whites comprising the seven men on jury roll.

In the absence of evidence to the contrary, there is a presumption or inference that the officers in charge of the selection and summoning of the jury have performed their duty fairly and justly without discrimination against eligible class or race. *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 402.

The evidence further showed that the Jury Commissioners of Dallas County, Alabama, had adopted a policy not to include those persons, white and Negro, qualified for jury service on the jury roll who were exempt from such service by reason of Title 30, Section 3, Code of Alabama 1940, as amended. The evidence showed that those responsible for obtaining jurors had fairly and honestly attempted to carry out their duties. Where that is shown this Honorable Court has held in *Thomas v. Texas*, 212 U. S. 278, 53 L. Ed. 512, that there was no evidence of discrimination.

Petitioner contends that the lack of proportional representation of Negroes on the jury roll infers discrimination. Both

the courts of Alabama and the Supreme Court of the United States have held that the lack of proportional representation alone does not constitute discrimination. In *Brown v. Allen*, 344 U. S. 443, 97 L. Ed. 496, where defendant contended that discrimination was proved by evidence that thirty percent of those eligible as jurors were Negroes, while only seven percent of the names in the jury box were Negroes, a majority of the Court held that no discrimination against Negroes in the selection of the jury had been shown. Alabama statutory method of picking jurors compares closely with that of North Carolina.

Petitioner further contends that the failure to include every eligible Negro male citizen over twenty-one shows a systematic exclusion of Negroes from the jury roll. There is no legal reason for quashing an indictment or venire simply because the jury commission did not put the name of every qualified person on the roll or in the jury box, in the absence of fraud in drawing or summoning the jurors. Title 30, Section 46, Code of Alabama 1940; *Wimbush v. State*, 237 Ala. 153, 186 So. 145.

It is respectfully submitted that any evidence of discrimination or exclusion prior to October, 1953, would be inapplicable here in view of the new roll of jurors made up at the time in Dallas County, Alabama.

". . . The commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, and from which the venire was drawn which furnished the grand jury and petit juries here involved. There was nothing on the roll or cards which indicated their race . . . " *Fikes v. State*, 263 Ala. 89, 81 So. 2d 303. (Reversed on another ground 352 U. S. 191)

"Former errors cannot invalidate future trials." *Speller v. Allen*, 344 U. S. 443, 73 S. Ct. 397, 417, 97 L. Ed. 469.

In *Lewis Lloyd Anderson v. State*, 40 Ala. App. 509, 120

So. 2d 397, Cert. Den. 120 So. 2d 414, reference is made to the jury roll as follows:

> "The revision of the jury roll required to be made by statute every year consists primarily of adding names of men newly qualified, and the deletion of those who have died, become disqualifed, or come under a statutory exemption, so that the annual book or roll call carries over a great many names from a prior year. Therefore, we feel warranted in approaching this question in a case tried some five years after the Fikes trial in relying upon the finding of our Supreme Court in that case as an established foundation."

There was no evidence of any other than the normal changes set out in the preceding paragraph brought out by petitioner.

> "It is noteworthy that Anderson did not, as did Norris in Norris v. State of Alabama, supra, make any attempt to produce the jury rolls in open court so that they might be examined for the presence or absence of Negroes." *Anderson v. State,* supra.

The reason for this failure is obvious. Petitioner knew that an examination of the jury rolls would have completely destroyed the inference of exclusion which he has chosen to create by means of testimony of five witnesses while disregarding the best evidence, namely, the jury rolls.

Title 30, Sections 60 and 64, Code of Alabama 1940, provides for the manner of striking jurors in noncapital and capital cases, respectively. The record fails to show how the State and defendant chose to exercise the strikes as to the array for the petit jury. The record could have been made to show this on appeal, but such point was not raised except by the inference that the absence of the two remaining eligible Negroes from the petit jury was due to the strikes of the State even though the defendant in the trial below had two strikes to each one allotted the State.

Petitioner has made every effort to show that this case is so nearly like the cases he cites that it should be reversed.

Cases cited by petitioner include such instances as where a jury statute provided that "all white males who are twenty-one years . . . shall be liable to serve as jurors," where no Negro had ever been known to have been on the jury roll, where payment of poll tax was a consideration, where jury box has either different colored or marked cards to distinguish Negro voters, where the judge selected the jury from cards drawn out by him and basing his selection on personal knowledge or reputation in the community, where a token number of Negroes were placed on the jury roll, etc. None of these instances referred to by petitioner in his brief were shown by the evidence to have existed here.

This Honorable Court has consistenty held that proportional representation is not a consideration requisite as to selection of jurors.

In Akins v. Texas, 325 U. S. 398, 89 L. Ed. 1696, 65 S. Ct. 1276, this rule was stated as follows:

> " . . . Fairness in selection has never been held to require proportional representation of races upon a jury. Virginia v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667, 670, 671; Thomas v. Texas, 212 U. S. 278, 282, 53 L. Ed. 512, 513, 29 S. Ct. 393. Purposeful discrimination is not sustained by showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried . . . The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by

unequal application of the law to such an extent as to show intentional discrimination."

And in *Hernandez v. Texas*, 98 L. Ed. 866, 347 U. S. 475, 74 S. Ct. 667, the Court in concurring with above case stated:

"His only claim is the right to be indicted and tried by juries from which members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution."

Petitioner was accorded this constitutional right.

In the recent case of Bailey v. Henslee, 184 F. Supp. 298, in denying petition for writ of habeas corpus, the Court concluded that there was no racial discrimination practiced in the selection of the jury panel which tried petitioner. In that case petitioner alleged that the Jury Commissioners in Pulaski County, Arkansas, had purposely limited and restricted the number of Negroes serving on any petit jury panel from 1952 through 1956 and in particular only three Negroes of the thirty-six selected to serve on the regular jury panel and no Negroes out of one hundred selected to serve on the special jury panel. And the jury commissioners each testified they were each familiar with qualified Negroes, but did not select Negroes with the intention of having any particular number, but did select three Negroes on the regular panel. Although the allegations as to number of Negroes on the jury panel was proved, the Court held that though petitioner was not entitled to any percentage of representation on the jury panel which tried him, or to representation, as such, at all, there must be neither inclusion nor exclusion because of race. To comply with the Constitutional requirement as to selection of jurors, race is an irrelevant factor; that the evidence presented did not establish such a patteru of disproportionate representation as to compel the finding that it must necessarily have been achieved through discriminatory limitation upon the basis of race.

Respondent contends that no token representation was

attempted in this case. There was not shown any proof of systematic exclusion of Negroes from the Grand or Petit Juries of Dallas County, Alabama. Rather, the Commissioner used the same standards in selecting all jurors, regardless of race. There was no evidence showing a wilful passing over of qualified Negroes nor of any fraudulent drawings from the jury box for the venire or from the hat (or box) in picking a grand jury panel.

VIII

CONCLUSION

There has been no proof of systematic exclusion of Negroes from the Grand or Petit Juries in Dallas County, Alabama; on the contrary, the evidence conclusively shows the jury box was filled and the venires drawn without regard to race or color.

Respondent submits that petitnoner was indicted, tried, convicted and sentenced properly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, this case should be affirmed.

Respectfully submitted,

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of Alabama

Counsel For Respondent

CERTIFICATE

I, David W. Clark, one of the attorneys for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served a copy of the foregoing brief and argument on one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

To: Honorable Fred D. Gray
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